

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA :
 :
v. : **CRIMINAL NO. 10-CR-064**
JONATHAN PAUL WIKTORCHIK :

**GOVERNMENT’S SUPPLEMENTAL RESPONSE IN OPPOSITION TO
DEFENDANT’S MOTION TO REDUCE SENTENCE
PURSUANT TO 18 U.S.C. § 3582(c)(1)(A)(i)**

On December 15, 2020, defendant Jonathan Paul Wiktorchik filed a *pro se* motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). ECF No. 75. On March 9, 2021, Wiktorchik filed a Supplemental Motion seeking compassionate release. ECF No. 78. On March 15, 2021, the government filed a response in opposition, asserting that he had recovered from COVID-19; the government further opposed relief on the grounds that he committed a very serious crime for which he has a significant amount of time remaining to serve, and all pertinent sentencing factors warrant denial of the motion. ECF No. 80.

On April 14, 2021, this Court denied the motion. ECF No. 89. Thereafter, on May 3, 2021, Wiktorchik filed a *pro se* Motion for Reconsideration, ECF No. 91, which was followed by two *pro se* supplemental motions on May 27, 2021, and July 15, 2021. ECF Nos. 94, 96. Wiktorchik’s motions remains pending.

The government continues to maintain that relief should be denied, for all of the reasons we articulated earlier and those articulated by this Court. We present

this supplemental response to provide the Court with updated information regarding the status of the virus at FCI Fort Dix, and Wiktorchik's vaccination status (he declined a vaccine).

1. At present, FCI Fort Dix houses 2,879 inmates. Currently, there are no inmates who are reported positive for COVID-19, and have not been for over two months. There are 1,712 current inmates who previously tested positive and have recovered. There were two COVID-related deaths at this institution, most recently in late January 2021.

This positive outlook is consistent with the status of the virus throughout the BOP system, as BOP continues to enforce the mitigation measures it has applied for the past 16 months. Currently, there are over 143,000 inmates in BOP-managed institutions and community-based facilities. At present, there are 245 inmates who are reported positive. Further, there has not been a COVID-related death of a BOP inmate since June 17.

The Court may consider these facts. *See, e.g., United States v. Robinson*, -- F. App'x --, 2021 WL 2978893, *1 (3d Cir. July 15, 2021) (not precedential) (when denying a motion for compassionate release, it was appropriate for the court to consider the prison's then-current rate of COVID-19 infection, and evidence that the defendant's health conditions were being adequately managed by the facility's medical staff).

2. As part of its battle against the coronavirus, BOP has offered a vaccine to every inmate. At Fort Dix, 1,711 inmates, which is 59.4% of the inmate population, have been vaccinated.

Wiktorchik is one of the inmates who refused a vaccine. On March 11, 2021 (long before the vaccine was available to most Americans), BOP offered the Moderna vaccine to Wiktorchik, and he declined it. *See Exhibit A at p. 126*. He stated that 20 years ago, a reaction to the influenza vaccine put him in the hospital for ten days, so he is concerned about a reaction to the COVID vaccine. *Id.* at 3. BOP does not have medical records from 20 years ago for Wiktorchik.

Given the very high effectiveness thus far of the Moderna and other vaccines, “[n]ow that COVID-19 vaccinations are being administered throughout the Bureau of Prisons, compassionate release motions generally lack merit.” *United States v. Reed*, 2021 WL 2681498, at *4 (E.D. Pa. June 30, 2021) (Schmehl, J.). “Courts now widely recognize that a refusal to take preventative measures to protect oneself from COVID-19 undermines any assertion that the risk of viral infection constitutes an extraordinary and compelling reason justifying release.” *United States v. Downer*, 2021 WL 2401236, at *2 (D. Md. June 11, 2021) (Gallagher, J.); *see also United States v. Baeza-Vargas*, 2021 WL 1250349, at *2-3 (D. Ariz. Apr. 5, 2021) (Teilborg, J.) (“Judges of this Court, as well as others around the country, have ruled with consistency that an inmate’s denial of a COVID-19 vaccination weighs against a finding of extraordinary and compelling circumstances.”) (citing more than a dozen cases); *United States v. Strother*, 2021 WL 2188136, at *8 (E.D.

Tex. May 27, 2021) (inmate who declined Johnson & Johnson vaccine “cannot be heard to complain about the dangers of COVID-19 in prison and then fail to take the available measures to mitigate the risk, such as being vaccinated.”).

We recognize that, according to experts, “People who’ve had an immediate allergic reaction to any vaccine or injectable medication should be cautious about getting the vaccine.” <https://www.mayoclinic.org/coronavirus-covid-19/vaccine/comparing-vaccines#who-should>. The Cleveland Clinic recommends that a person with a severe previous reaction to a flu shot be evaluated by a board-certified allergist before getting the COVID vaccine.

<https://www.cleveland.com/coronavirus/2021/02/should-you-get-the-coronavirus-vaccine-if-youve-had-a-bad-reaction-to-a-flu-shot.html>. Wiktorchik has not received such an evaluation while in BOP custody.

To be clear, however, public health authorities do not recommend that a person with Wiktorchik’s claimed history not receive the vaccine. Individuals are definitively advised not to take the vaccine only if they previously have had a serious allergic reaction to one of the ingredients of the COVID-19 vaccine. Fact Sheet for Recipients and Caregivers, Moderna (FDA), at p. 2, <https://www.fda.gov/media/144638/download>. Although an allergist has not evaluated Wiktorchik, there is no indication that this restriction applies to Wiktorchik. The CDC does recommend a longer observation period (30 minutes as opposed to the normal time of 15 minutes) after administration of the vaccine to a person with a history of an immediate allergic reaction to a different vaccine.

<https://www.cdc.gov/vaccines/covid-19/clinical-considerations/managing-anaphylaxis.html#routine>.

The government continues to maintain that the motion for compassionate release was properly denied, given Wiktorchik's recovery from the disease, the information reported in this memorandum, and all pertinent sentencing factors.

Respectfully yours,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading has been served by first-class mail, postage prepaid, upon:

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Dated: July 26, 2021.